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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 886

PAUL M. HUGHES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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The Brief for the United States in Opposition to the Petition for Certiorari underscores and compounds the conflict relative to the standard applicable to a motion before sentence to withdraw a guilty plea. The appropriateness of a grant of certiorari to resolve that conflict now becomes even clearer.

1. Reflecting the approach of the Second Circuit, the United States urges (Brief, p. 6) that the plea of guilty was entered voluntarily and with a full understanding of the consequences, and that petitioner later implied he was guilty in an interview with Government counsel. The subsequent claim of innocence, made in connection with the motion to withdraw the guilty plea, is said to be belated and to lack *bona fides* not be-

cause of any finding as to his past or present state of mind but "because petitioner was fearful a sentence more severe than he had hoped for might be imposed" (Brief, p. 6).

In short, the Government merely restates the Second Circuit's view that there must be something more than an assertion of innocence in order to sustain a withdrawal of a guilty plea. All efforts to demonstrate petitioner's honest belief in his innocence, both at the time of entering the plea and at present, were rejected by the courts below.[1] Thus the Government's present

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[1] The Court of Appeals ruled (Pet., p. 14) that petitioner's present protestations of innocence were properly excluded as "not probative of his former state of mind." And the District Court rejected all efforts of petitioner to prove his belief as to innocence at the time of entering the guilty plea. Thus at R. 949, the court sustained the Government's objection to the following offer of proof:

> "Mr. Schachner: I offer to prove that the witness prior to the change of plea, at the time of the change of plea and thereafter felt innocent of the charge to which he had pleaded guilty and that the sole reasons for his plea of guilty were the fears which had been the subject matter of the previous offer of proof and the statements by the government and by Mr. Bolan, which Mr. Hughes had received."

The court also struck the answer to the following question (R. 592):

> "Q. Mr. Hughes, prior to the time you pleaded guilty to one count of the indictment with which we are concerned, did you feel yourself innocent of the charges? A. Yes, I did.
>
> "Mr. Cohn: Objection, your Honor.
>
> "The Court: Didn't I tell you to wait until the lawyer has a chance to get a ruling from the Court on his objection?
>
> "The Witness: Yes, sir. I thought I had waited.
>
> "The Court: Strike out the answer. Will you repeat the question, Mr. Reporter? (Record read.)
>
> "The Court: Objection sustained."

See also R. 1035.

effort (Brief, p. 6) to suggest that petitioner's claim of innocence lacked *bona fides* is without foundation; no effort was made by the courts below to hear or determine the *bona fides* of the claim of innocence. What is left is a claim by the Government that the law requires some sort of *unfair inducement* underlying the entry of the guilty plea as a condition to withdrawal before sentence.

But to insist on that requirement is to transform a motion to withdraw the plea before sentence into either (a) a motion to withdraw after sentence on grounds of "manifest injustice", or (b) a post-conviction motion under Rule 11 to vacate a guilty plea on grounds of fraudulent inducement, depriving the plea of its necessary voluntariness. No court has ever held that a motion under Rule 32(d) before judgment can be so transformed. And to so hold is to inject a new and confusing standard into the administration of Rule 32(d).

Courts have heretofore held that before sentence a motion to withdraw a guilty plea should be "freely granted" if (a) any reason is presented which is not frivolous and which indicates that it would be "fair and just" to grant the motion and (b) no prejudice to the Government or the courts would result from permitting the defendant to go to trial. See, e.g., *Kadwell* v. *United States*, 315 F. 2d 667, 670, n. 12 (C.A. 9); *Gearhart* v. *United States*, 272 F. 2d 499, 502 (App. D.C.). Such cases necessarily reject any requirement that the original guilty plea be improperly induced.

Thus it is enough, under the principles followed by those authorities, that this petitioner, asserting his innocence, had reason to believe that the Government

would repudiate an acknowledged representation, on the basis of which petitioner voluntarily entered the plea, whereby petitioner was to cooperate fully in return for a favorable statement by the Government as to that cooperation at the time of sentencing. The dispute that arose as to the extent to which cooperation by the petitioner was possible was left unresolved below, albeit without reflecting upon the *bona fides* of the positions taken by either the Government or the petitioner.[2] Indeed, such a dispute itself would make it "fair and just" to permit a withdrawal. The Government has no vested right in petitioner's guilty plea in these circumstances.

Since the standard to be applied as to motions to withdraw before sentence is of recurring importance in the administration of Rule 32(d) and since this Court has not had occasion since the adoption of that rule to define the standard for pre-sentence motions,[3] certiorari should be granted to dispel the confusion created by the decision below.

2. The United States has not denied the "spectacle of the trial judge presenting testimony," *In re Murchison*, 349 U.S. 133, 139, in a proceeding which finally seals the accused's fate. Nor has the United States answered the incongruity of the trial judge's action in

[2] The District Court's opinion (Pet., p. 25) sets forth the existence and nature of this representation and acknowledges that a *bona fide* dispute arose as to the extent to which petitioner could cooperate. The court refused to adjudicate the dispute since it felt that such an adjudication would "inject a disruptive element into the judicial administration of criminal justice".

[3] Cf. *Kercheval* v. *United States*, 274 U.S. 220, 224, decided before adoption of Rule 32(d), indicating the standard to be applied as to post-sentence motions.

awaiting the outcome of the hearing to determine the materiality of his own testimony. The judge's testimony as to the repudiation of the bypassing "agreement" became immaterial only by virtue of the judge's own finding that petitioner failed to prove the existence of such an "agreement." But the proscription of 28 U.S.C. § 455, disqualifying a judge who "is or has been a material witness," should not depend upon a hindsight view of the proceeding. To avoid the pressures on the judge and to accord the defendant the rights that § 455 was designed to achieve, it should be interpreted to require disqualification whenever it appears before a hearing that the judge's testimony might make him a material witness. See *United States* v. *Halley*, 240 F. 2d 418, 419 (C.A. 2); *United States* v. *Valentino*, 283 F. 2d 634, 636 (C.A. 2).

The intrinsic importance of this issue in the fair administration of criminal justice and the absence of a definitive ruling as to the interpretation to be accorded § 455 under these circumstances make the grant of certiorari appropriate as to this issue.

CONCLUSION

For the reasons expressed in the Petition and in this Reply Brief, the judgment below should be reviewed.

Respectfully submitted,

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